IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

119 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Petitioners,

v.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER, and GEORGE BERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MIDTOWN REALTY OWNERS' ASSOCIATION, INC., AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term, 1946

No. 497

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149 Madison Avenue Corp. and Williams & Co., Inc.,
Petitioners,

v.

Frank Asselta, Camilo Del Rio, Joseph McArdle, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger, and George Berger.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MIDTOWN REALTY OWNERS' ASSOCIATION, INC., *AMICUS CURIAE*

Opinions Below

The opinion of the District Court (R. 184-202) is reported at 65 F. Supp. 385. The opinion of the Circuit Court of Appeals (R. pp. 81-84) is reported at 156 F.(2d) 139.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 17, 1946 (R. pp. 84-85). The petition for a writ of certiorari was filed on September 13, 1946, and

granted on December 9, 1946. The jurisdiction of this Court is based upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Petitioners adhered to, and compensated their employees under, a master collective agreement. This agreement: (1) fixed the regular workweek for most building service employees at 46 hours and for watchmen at 54 hours; (2) provided a minimum weekly wage for such regular workweek; and (3) to determine the regular hourly rate of each employee, embodied the following formula: The employee's weekly wage for his regular workweek was divided by the sum of the number of hours of the regular workweek plus one-half the number of hours of such workweek which were in excess of 40.

This hourly rate thus computed under the formula was constant, and controlled all compensation paid to respondents, who received the hourly rate for all non-overtime hours worked and 150% thereof for each hour worked in excess of 40.

The question presented is whether the hourly rate of pay thus computed under the formula is the "regular rate" of pay upon which overtime compensation is to be computed under Section 7 of the Fair Labor Standards Act of 1938.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——
>
> * * * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this Section], unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

The Interest of Amicus Curiae

Midtown Realty Owners' Association, Inc., *amicus curiae*, is an association of owners and managing agents of commercial loft buildings in the so-called garment center in New York City. Prior to the agreement in issue in the instant case, Midtown Realty and Local 32B, Building Service Employees International Union, A. F. of L., entered into a collective bargaining contract governing the terms and conditions of employment of building service employees in the buildings owned or operated by Midtown members. Pursuant to an arbitral award of Arthur S. Meyer, this agreement between Midtown Realty and Local 32B embodied the so-called "Meyer formula" and certain other provisions governing wages and hours. The National War Labor Board ordered the inclusion of the same formula in the agreement which gives rise to the instant case.

Hence this Court's determination of the instant case will have a direct impact upon the validity of the Midtown agreement, many suits under which have been brought by employees, and are now pending.

Statement

1. *The Parties.* Petitioners are the owner and managing agent of a "Class C" loft building in New York City (R. 162-163, 166). Respondents are or have been maintenance and operating employees in such building, performing services as elevator operators, porters, firemen,

watchmen, and handymen (R. 164-165). The parties have stipulated that the respondents are covered by the Fair Labor Standards Act (R. 220).

2. *Local 32B and the Realty Advisory Board.* Since 1934, collective bargaining for buildings like that here involved, as well as for other types of buildings, has been conducted on an industry-wide basis (Ex. 4, p. 7). The employees have been represented by Local 32B of the Building Service Employees International Union, A. F. of L., whose membership in 1942 was approximately 30,000 out of some 76,400 employees eligible for membership (Ex. 4, p. 4). It is "the dominant labor organization among building service employees in Manhattan" (Ex. 4, p. 41).

Except in respect of buildings in the "garment center," which are represented by the Midtown Realty Owners' Association, Inc. and the Penn Zone Association, Inc. (Ex. 4, p. 16), the owners and managing agents have conducted this industry-wide bargaining through a voluntary organization known as the Realty Advisory Board on Labor Relations, Inc. (Ex. 4, p. 5). The Board represents some 2225 buildings, which have 20,784 employees. These buildings vary greatly in type, function, age, size, clientele and methods of operation. They include office buildings, loft and apartment houses. (Ex. 4, p. 8.) The Realty Advisory Board acts in an advisory capacity to the member buildings, and assists in the negotiation of contracts. No member building, however, is bound to accept agreements negotiated by the Board. (Ex. 4, p. 5.) The owners and operating agents of each building are bound by any agreement only if, and when, each accepts it (Ex. 4, p. 5).

3. *The Sloan Agreement.* For the period preceding April 20, 1942, the wages and working conditions of member buildings and their employees were governed by the Sloan Agreement (Ex. 3; Ex. 4, p. 9). This Agreement

provided, for Class C loft buildings like petitioners', a flat minimum weekly wage of $25 (Ex. 4, pp. 12-13). A work-week of 47 hours was established for all employees except watchmen, whose hours were set at 59 (Ex. 4, p. 14). The Sloan Agreement made no attempt, explicitly or imlicitly, to set forth an hourly rate and hence, concededly, falls within the ambit of *Overnight Motor Co.* v. *Missel*, 316 U. S. 572.[1]

4. *Events Preceding the National War Labor Board Agreement.* Negotiations between Local 32B and the Realty Advisory Board, looking toward a new agreement, began in March 1942, before the expiration of the Sloan Agreement. The negotiations were unsuccessful and the dispute was referred to the New York State Mediation Board. The Board's efforts were fruitless; so were negotiations before a representative of the office of the Mayor of New York City. On May 1, 1942, Local 32B called a partial strike. On the same day, in accordance with the procedure prescribed under Executive Order 9017 (promulgated January 12, 1942; 7 Fed. Reg. 237), the Secretary of Labor certified the dispute to the National War Labor Board. The strike was then terminated. (Ex. 4, p. 6.)

A Panel of the National War Labor Board[2] held hearings from May 18 to June 1, 1942. The Panel failed in its efforts to secure an agreement between the parties, and parties submitted testimony, documentary evidence and briefs. (Ex. 4, p. 6.)

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[1] There no longer is any question in this case of petitioners' liability under the Act for the period covered by the Sloan Agreement. Full payment, including attorneys' fees and liquidated damages, computed on the *Missel* formula, has been made for this period (R. 216-218).

[2] The Panel was composed of Ralph T. Seward, representing the Public, Dale Purves, representing the Employer, and Frank Tobin, representing the Employee (Ex. 4, p. 56).

On July 17, 1942, the Panel issued its Report and Recommendations (Ex. 4, pp. 4-72). On July 29, 1942, the National War Labor Board issued its Directive Order[3] under Paragraph 3 of Executive Order No. 9017, embodying the Panel's recommendations (Ex. 4, p. 3).

On September 1, 1942, Local 32B and the Realty Advisory Board entered into an agreement, known as the "National War Labor Board Agreement," embodying the terms of the War Labor Board Directive Order (Ex. 1). The instant dispute arises out of those terms of this Agreement which relate to the computation of the hourly rate of pay.

5. *The National War Labor Board Directive Order and Agreement—the Meyer Formula.*[4] The National War Labor Board ordered, and the subsequent agreement provided, that the minimum weekly earnings, for the regular workweek, for Class C loft buildings be increased from $25 to $27.50 (Ex. 4, pp. 30, 32; Ex. 1, pp. 6, 25). For elevator starters and assistant elevator starters, the minimum for the regular workweek was increased from $26 to $28.50, and for handymen from $27 to $29.50 (Ex. 4, pp. 30-31; Ex. 1, p. 25). The wages of all employees who received more than the minimum were increased by an amount which would maintain the existing dollar differentials (Ex. 4, pp. 30-31; Ex. 1, p. 26).[5] The regular workweek of watchmen was reduced from 59 hours to 54, and the regular

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[3] The Directive Order was signed by Frank P. Graham, Robert F. Black, Wayne L. Morse, Richard T. Frankensteen, Roger D. Lapham and Martin P. Durkin.

[4] The dispute, and hence the Directive Order and subsequent Agreement, concerned a number of issues other than wages and hours. Also involved were issues such as maintenance of membership, vacations and an arbitration clause (Ex. 4).

[5] Thus a handyman who received $28 under the Sloan Agreement ($1 more than the minimum) received $30.50 under the National War Labor Board Agreement.

workweek of all others regularly employed was reduced from 47 hours to 46 (Ex. 4, p. 33; Ex. 1, pp. 27-28).[6]

In addition, the Panel Report and Recommendations, embodied in the Directive Order, provided (Ex. 4, pp. 33-34):

> "It was understood at the hearing that if the Board set hours for offices and lofts above the 40-hour maximum demanded by the Union, the parties would adopt the formulae of the Meyer Agreement for the calculation of hourly rates, and the fixing of overtime. These formulae were introduced because of the prospective application to loft buildings of the Fair Labor Standards Act. We quote and explain them in Appendix B [Ex. 4, pp. 70-72]. As they have been accepted in principle by the parties, we believe they should be incorporated into the present contract."

While "leaving . . . the exact language" of the Meyer Agreement clauses to "direct negotiations," the Panel stated that it "considers both parties bound to accept the principles of the Meyer Agreement formulae without change" (Ex. 4, p. 70). The Meyer formula, which, as the Panel noted, was itself embodied in an arbitral award covering the garment center buildings and rendered by Arthur S. Meyer (Ex. 4, p. 16), was fully explained by the Panel and the relevant provisions of the Meyer Agreement were set out in its Report (Ex. 4, pp. 70-72).

In accordance with the Report and Recommendations of the Panel, later made the Directive Order of the War Labor Board, the Meyer formula and the relevant provisions of the Meyer Agreement were embodied in the final agreement

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[6] The agreement, as required by the National War Labor Board, provided that the new wages and hourly rates be retroactive to April 21, 1942. However, since the employees had already worked between April 21, 1942 and August 10, 1942 (when the workweek was reduced to 54 hours for watchmen and 46 for other employees, in anticipation of the agreement), the reduced workweek could not be made retroactive. Hence, during the interim period, the workweek necessarily remained at the hours fixed by the Sloan Agreement.

between Local 32B and the Realty Advisory Board. The Meyer formula provided that (Ex. 4, p. 71; Ex. 1, p. 27):

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The "regular weekly hours" for employees other than watchmen were set at 46, and for watchmen at 54; regular working hours in excess of 40 were not to be reduced by the employer in order to effect a corresponding reduction in pay (Ex. 4, pp. 71-72; Ex. 1, pp. 27-28). Employees were to receive "at least time and one-half" for overtime for hours in excess of 40 but less than 46 hours (54 in the case of watchmen), and one and three-quarters for overtime in excess of 46 hours (double time for hours in excess of 54 in the case of watchmen) (Ex. 4, p. 72; Ex. 1, p. 29). In the event of absences for sickness or other excusable causes, the straight hourly time as computed under the Meyer formula was to be deducted for the number of hours absent (Ex. 4, p. 72; Ex. 1, p. 29). The agreement further expressly stated the intention of the parties to be that "the wages paid, as provided for in this agreement . . . shall constitute full payment for services rendered under this agreement" (Ex. 1, p. 7).

6. *The Operation of the Meyer Formula.* Respondents were employed and paid in accordance with the terms of the National War Labor Board Agreement (R. 120, 147). Subsequent to the execution of that Agreement, their weekly payrolls reflected the number of hours worked each day, the total number of non-overtime hours (40 or less), the hourly rate for regular time (40 or under), the wages paid for such non-overtime hours, the number of overtime hours (i. e., over 40), the overtime rate (e. g., 150% for hours between 40 and 46), the wages paid for overtime hours, the total number of hours worked each week and the total pay (Ex. 6, pp. 36-103).

Thus from September 5, 1942 to April 21, 1943 (when wages were again increased), respondent Peterson's regular workweek was 46 hours and his weekly earnings $27.50 (Ex. 6, e. g., p. 36). During this period, the Meyer formula thus yielded him an hourly rate of $.561+

$$\left(\frac{\$27.50}{46 + \frac{1}{2} \times 6} = \frac{27.50}{49} = .561+\right),$$

and an overtime rate for hours in excess of 40 but not more than 46 of $.843. He was compensated on this basis for all hours worked by him. When, in the course of a workweek, he was absent for inexcusable cause for 23 hours, he was paid $12.90 (23 X .561) (R. 143-144; Ex. 6, p. 60). In another workweek, he was absent for excusable cause for 16 hours, and thus worked for 30 hours. Accordingly, 16 hours at straight time (16 X .561 or $9) was deducted, and he received $18.50. (Ex. 6, p. 48.)[7] In a third week, Peterson worked 52 hours, six more than the regular workweek. For this week, the payroll shows that he received $22.44 for the first 40 hours (40 X .561), plus $5.06 for the next six hours (6 X .843, time and a half), plus $5.88 for the next six hours (6 X .98, time-and three-quarters) —or a total of $33.38 (Ex. 6, p. 55).

Thus, whether Peterson worked 23 hours, 46 hours or 52 hours, his regular hourly rate remained constant and did not fluctuate in order to yield the earnings prescribed for his regular workweek.

7. *Opinions of the Courts Below.* The District Court held that the wage payments under the National War Labor Board Agreement did not comply with the Act. It found that the Meyer formula "was designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way," and that its purpose was "to

[7] See Ex. 1, Sec. III, par. 5(i), p. 29. The deduction was reflected on the payrolls by showing 24 hours at straight time (24 × .561 = $13.44) and 6 hours at time and a half (6 × .843 = $5.06). See R. 141-142.

reduce the hourly rate sufficiently so that the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement" (R. 171-172). In its opinion, the Trial Court stated that "The fact that defendants here actually applied in all situations the hourly rates so derived [from the formula] does not validate such rates" (R. 200) since such hourly rates "bore no relation to the regular rate of the workweek as defined in Overnight Motor Co. *v.* Missel"[8] (R. 198-199).

The Circuit Court of Appeals affirmed on the ground that the effect of the use of the formula was to preclude payment of more than the agreed weekly wage except where the employee worked in excess of the regular workweek. It held that the statutory purposes were thwarted since employment was based "upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours" and since the weekly wage was then broken "down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate" (R. p. 84).

Specification of Errors

The court below erred:

1. In holding that the hourly rates computed under the Meyer formula were not the "regular rates" at which respondents were employed within the meaning of Section 7 of the Fair Labor Standards Act.

2. In affirming the judgment of the District Court which granted recovery to respondents against petitioners for overtime wages, liquidated damages, attorneys' fees and costs and disbursements.

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[8] 316 U. S. 572.

Summary of Argument

The hourly rate computed under the Meyer formula and specified in petitioners' payrolls is the statutory "regular rate." It reflects all payments for normal non-overtime work. The Meyer formula, and the hourly rate derived under the formula, was not imposed by unilateral action but as the result of collective bargaining and of a Directive Order of the National War Labor Board. Because the collective contract was a master agreement which covered a variety of buildings and numerous classes of employees receiving a large number of differing weekly rates of pay for their regular workweek, no specific statement of hourly rates in terms of dollars and cents was feasible. Instead, the minimum weekly rates for the regular workweek of 46 or 54 hours were specified, and the Meyer formula was embodied so that the hourly rate of each employee could be computed. The formula is not an arbitrary mathematical device, but is simply an algebraic restatement of the Fair Labor Standards Act.

The collective agreement did not provide a flat weekly salary which served as a fixed measure of compensation regardless of the number of hours worked. Rather, since the weekly earnings specified in the agreement were for a fixed workweek, the divisor in the Meyer formula was constant. Hence the hourly rate computed under the formula was also constant, and immediately ascertainable in advance. The hourly rate thus computed controlled all compensation to respondents. They received the hourly rate for all hours worked up to 40, 150% of the rate for all hours worked over 40, and 175% of the rate for all hours worked over 46 (200% for hours over 54 in the case of watchmen). Accordingly, respondents' weekly pay varied, as required by the Act, as the number of hours which they worked varied.

For this reason, the Meyer formula is wholly consistent with the statutory purposes. Petitioners' labor costs were

increased by 50% at the end of 40 hours, and respondents received a 50% premium for all hours in excess of 40.

The mere fact that the Meyer formula does not yield as high an hourly rate as computation under the *Missel* formula does not affect this conclusion. The weekly earnings for the regular workweek were expressly intended to be the total of an allocation between straight time for 40 hours, and time and a half for overtime. Furthermore, in any event, the Act does not bar an employer from paying the same wage as the employees formerly received, so long as the rate exceeds the statutory minimum. In a contemporaneous construction of the Act, the Administrator of the Wage and Hour Division in fact sanctioned precisely the method of computation utilized in the instant case. 3 Wage and Hour Reporter 228.

ARGUMENT

THE HOURLY RATE DETERMINED BY THE MEYER FORMULA AND APPLIED IN WAGE PAYMENTS TO RESPONDENTS IS THE "REGULAR RATE" WITHIN THE MEANING OF SECTION 7 OF THE FAIR LABOR STANDARDS ACT.

A. The Validity of the Meyer Formula Is Not Controlled by Earlier Cases Decided by This Court, Holding That Specified Hourly Rates Are Not the "Regular Rates."

In this case, an organization representing a large number of building owners and agents, including petitioners, entered into a master collective agreement with a labor union representing the building service employees who were members of the union. The agreement specified a minimum weekly rate for each category of employee, and provided the method by which all other weekly rates above the minimum were to be determined. The weekly rate represented the amount to be paid for the regular workweek, which was set at 46 hours for all regularly employed full-time employees except watchmen, whose hours were 54.

And the agreement embodied an algebraic method, known as the Meyer formula, for determining the regular hourly rate for each employee whose workweek was thus fixed at a specified number of hours in excess of 40. Because the number of hours was so fixed, the regular hourly rate computed under the formula was necessarily constant for each employee, and his weekly earnings accordingly varied, dependent upon the number of hours he actually worked each week.

Petitioners, in preparing their weekly payrolls, reduced the weekly rate specified for each employee under the agreement to an hourly rate by means of the prescribed formula. The computation of each employee's weekly earnings was made on each payroll on the basis of the hourly rate so computed, with 150% (or in circumstances defined by the agreement, 175% or 200%) thereof for overtime (Ex. 6, pp. 36-103).

Thus, this case contrasts sharply with the earlier hourly rate cases decided by this Court in which the employer was found to transgress the Act. In *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, there was no question whether a specified hourly rate was the true statutory rate, since there, only a flat weekly wage was specified in the employment contract; there was no statement of an hourly rate. In the remaining three cases,[9] the employment contract specified a purported hourly rate, which, however, failed to reflect all the earnings of the employees for normal non-overtime hours.[10]

No such situation is presented by the instant case. Unlike the *Missel* case, the precise method of computing the

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[9] *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Helmerich & Payne*, 323 U. S. 37.

[10] In *Youngerman-Reynolds*, the specified hourly rate excluded a regularly received piece-work guaranty; in *Harnischfeger*, the hourly rate ignored a regularly received "incentive bonus" or "piece-work earnings"; and in *Helmerich & Payne*, the hourly rate was based on an arbitrarily chosen fraction of the regular day worked.

regular hourly rate was here specified in the master agreement, and only the regular hourly rate thus computed was used in the petitioners' payrolls and payments. And while the ultimate question in this case, like that in the *Youngerman-Reynolds, Harnischfeger* and *Helmerich & Payne* cases, is whether the hourly rate specified is the statutory rate, in this case, unlike those cases, there was no arbitrary and abnormal exclusion of usual earnings for non-overtime work in the computation of the rate.

Accordingly, if the hourly rate derived from the Meyer formula is invalid, it is invalid only because the statement in the master agreement of the minimum weekly rate for the fixed workweek overrides the express intention of the parties and the explicit statement, and use, of a fixed regular hourly rate for each employee for hours up to 40, and time and a half for hours over 40. We shall show that the circumstances which gave rise to the Meyer formula, and the method of its actual operation, preclude such a conclusion.

B. The Circumstances Leading to the Adoption of the Meyer Formula Establish Its Bona Fides.

At the threshold, the genesis of the Meyer formula is to be emphasized.

The Meyer formula and the Meyer clauses had their inception in another master agreement between Local 32B and the Midtown Realty Owners' Association, Inc., (*amicus curiae*) covering loft buildings in the garment center. The formula and the clauses had been embodied in that agreement as a result of an arbitral award issued by Arthur S. Meyer, Chairman of the New York State Mediation Board. (Ex. 4, p. 16.) In the negotiation of these agreements, the employees were represented by the "dominant" labor union in the field (Ex. 4, p. 41). And the instant agreement embodying the Meyer formula was even more than the product of vigorous collective bargaining between equally strong groups. It was the climax of State and City mediation, a strike, and, after hearings, a Directive Order of the

National War Labor Board. Indeed, since the Panel explicitly stated its expectation that the Meyer formula and clauses would be included in the agreement without substantial change (Ex. 4, p. 70), the Directive Order itself would have been violated had the Meyer formula and the Meyer clauses been omitted from the master agreement.

It is against this background that the validity of the hourly rates computed under the Meyer formula must be judged. The background, we submit, negates any conclusion that the Meyer formula was any invention by the employers conceived with sinister purpose and imposed by the employers upon employees in order to deprive them of their rights under the Act.

Similarly, the circumstances which impelled the use of the formula disclose that it is not merely an "ingenious mathematical manipulation" (see *Helmerich & Payne* case, 323 U. S. 41) whose only rationale can be the setting of an arbitrary hourly rate which would permit the evasion of the Act. On the contrary, the critical provisions of the National War Labor Board Agreement find their basis in sound and practical considerations.

The parties negotiating the collective agreement were faced with a knotty practical problem. As we have seen (Statement, p. 4), the Realty Advisory Board had no power to bind its members; each was free to accept or reject the agreement. Over 2200 buildings of every type and character were involved. Over 20,000 employees were affected. Not only were the employees in different categories of employment, commanding different wage classifications, but even those within the same category in the same type of building did not receive identical wages.

Necessarily, therefore, the contract had to be in the form of a master agreement. And, by the same token, the agreement necessarily could do no more than provide, in the most specific manner possible, the mathematical bases for computing the pay of each employee. Thus, the agreement set minimum weekly earnings for the regular workweek for each class of employees and provided for a method of deter-

mining weekly earnings above the minimum from that point.[11] And, in turn, the next step of enunciating a method of reducing to an hourly rate whatever weekly rate was thus arrived at, was taken by embodying the Meyer formula.

The circumstances did not lend themselves to any other arrangement. Since the agreement set out only the minima for each class of employees, and provided the means of determining the pay for the regular workweek for those receiving *more* than the minimum (Ex. 1, p. 26), the problem of writing into the master agreement the specific hourly rates, in terms of dollars and cents for each class of employee in each building, would not have been at all feasible. It would have been necessary to set out such a specific hourly rate for each possible total of weekly earnings above $27.50 for a regular workweek of (a) 46 and (b) 54 hours.[12] While hindsight might have dictated some such unwieldy attempt, it was not a process which would suggest or commend itself.

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[11] Thus Ex. 4, Sec. III, Par. 3, p. 53 provided:

> "All employees covered by this agreement in Class 'A', 'B' and 'C' loft building who on the date of the Directive Order of the National War Labor Board in Case No. 141 . . . were receiving more than the minimum for their classification established by the Sloan Agreement, shall receive an increase equivalent to that awarded other employees in a like classification. To illustrate: The minimum for a handyman in a Class 'B' loft building under the Sloan Agreement was $28 per week. The new minimum is $31.40. If a handyman in such a building had been receiving $30 per week, he should now receive $33.40 per week."

[12] In the court below, respondents suggested that no such multiplicity was required, since it is as simple to state the hourly rates as it is to state the weekly earnings; and that there could have been no greater number of fixed hourly rates than there were of fixed weekly wages paired up with fixed workweeks. But this suggestion rests on a misapprehension, for the agreement did not state a series of fixed weekly earnings. As already noted, the agreement fixed only a minimum for each category, and, in the manner described in the preceding footnote, provided the formula for computing all

(Footnote continued on next page)

This is particularly true here since this was a field, like many other fields of non-industrial employment, where basic earnings are normally stated in weekly, rather than hourly, terms, and where the employees, accustomed to a statement of basic weekly earnings, are not primarily interested in hourly rates. In a master collective agreement of this nature it was far simpler and far less abnormal simply to set out the methods of arriving at the various weekly earnings for the regular workweek and at the multiple hourly rates, and await the translation of their bases into hourly rates in terms of specific cents through the medium of the operative payrolls which each building used. This is precisely what was done.

Thus, respondents' contention (brief in opposition to petition for certiorari, pp. 11-14) that the method of stating the wages embodied in the agreement was conceived with some sinister purpose of deceiving the employees and "simulating substantial wage increases" is wholly negated. It is hardly probable that either the National War Labor Board or Local 32B, representing respondents, would have made themselves active parties—as they did—to any such purpose.

In any event, respondents are inaccurate in their basic premise that, had the actual hourly rates been stated, it would have disclosed "insignificant increases" or "substantial reductions" and hence would have been rejected by the

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weekly earnings above the minimum. And in any event, no meaningful provision relating to hourly rates parallel to that relating to weekly earnings could be devised. While the *minimum* hourly rates could have been stated, there was no established hourly differential; as there had been an established differential for weekly rates, existing to identify the hourly rates above the minimum. For under the predecessor Sloan Agreement, there were no hourly rates, and as noted by respondents in their brief in opposition to the petition for certiorari (p. 12), it was not until later that the calculations under the *Missel* formula were completed for the purposes of computing the amounts due under the Sloan Agreement.

employees.[13] The short answer is that the new hourly rates prescribed in the agreement for Local 32B employees were, after August 10, 1942, substantially higher, in all cases, than the hourly rates under the Sloan Agreement recomputed by the *Missel* formula.

For example, the Sloan award prescribed a minimum weekly wage of $25 for a regular workweek of 47 hours. For this the *Missel* formula yields an hourly rate of a trifle under $0.532. Yet the same employee, under the National War Labor Board Agreement and its Meyer formula, received, after August 8, 1942, an hourly rate of $0.561—or an increase of almost 5½%.

The record, we submit, accordingly establishes a sensible and practical rationale for the provisions of the National War Labor Board Agreement and requires rejection of respondents' speculations concerning the reasons for them.

C. The Meyer Formula Is Not an Artificial Device but Is a Restatement of the Act Itself.

The Meyer formula is not an arbitrary algebraic device without rational basis. On the contrary, the formula is simply a restatement of the Act itself. Thus, let us suppose a Wage-and-Hour-minded algebra teacher were to put the problem to his students of arriving at the statutory regular rate of employees of an employer who has set such a rate, who pays 150% of such rate for each hour worked in excess of 40, and whose employees' regular workweek is 50 hours, for which they receive $55 each week. Of course, the answer will be yielded only by the Meyer formula.

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[13] The "New Hourly Rate" set forth in respondents' brief in opposition (p. 11) is the rate only from April 21, 1942 to August 8, 1942. The rates for McCole were necessarily lower since the employees were still operating under the Sloan Agreement and hence worked 47 or 59 hours. On August 8, shortly after the NWLB Directive Order, the hours were reduced to 46 and 54 hours in anticipation of the NWLB Agreement. And while the latter provided that the wage increases were retroactive to April 21, 1942, it was impossible similarly to provide in respect of the reduction in hours.

This is why it is not sufficient to condemn the formula, as respondents have contended because the formula is, in a sense, "tautological". It is entirely true that if the starting point is weekly earnings for a regular workweek in excess of 40 hours (and in a great many non-industrial fields of employment, that is the natural starting point), the Meyer formula does no more than yield a regular hourly rate which, together with time and a half for overtime, equals such weekly earnings. That is inherent in the process. But to conclude that it therefore transgresses Section 7 of the Act is in all cases to prohibit the statement of weekly earnings for a regular workweek in excess of 40 hours. For even where, as in this case, such statement of weekly earnings is expressly intended as the total of straight time for hours up to 40, and time and a half for the fixed hours in excess, the statement would, under respondents' contention, nevertheless be nullified by a rule that the weekly earnings must be divided by the regular hours worked. If this were true, the Act would in all cases preclude the statement of weekly earnings for a fixed workweek in excess of 40 hours, for there would necessarily be an infinite progression caused by the necessity of dividing each new total figure by the hours worked.

The Act requires no such startling result. Nor, as would seem to be implicit in respondents' contention, can compliance with the Act hinge upon the elusive inquiry into the mental processes by which the employer arrives at weekly earnings. Thus, it seems to be suggested that if the employer's mind dwells first on an hourly rate, from which is derived a statement of weekly earnings, there is compliance with the Act. But, on the other hand if (as is perfectly natural, since an employer must necessarily base wages on his total labor costs) an employer's starting point is the amount to be paid each week for a fixed workweek in excess of 40, he cannot, consistently with Section 7, break that down to an hourly rate which, when multiplied by 1½ for the overtime hours, would yield the weekly rate which he believes should be paid for the fixed workweek. Certainly

the Act does not turn upon any such psychoanalytical distinctions which yield no difference in result.

Rather, as the *Missel* case holds, the Act forbids a flat weekly rate regardless of the number of hours worked, and, as the *Belo* (316 U. S. 624), *Harnischfeger*, *Youngerman-Reynolds*, and *Helmerich & Payne* cases hold, it also forbids the setting of a fictitious hourly rate.

Both these tests are squarely met in this case.

D. The Agreement Did Not Provide for a Flat Weekly Wage and the Hourly Rates Derived Through the Meyer Formula in Fact Controlled the Compensation Received by Respondents.

This is not a case, like *Missel*, of a flat weekly rate paid regardless of the number of hours worked. Nor is it a case where the hourly rate fluctuates from week to week, dependent on the number of hours worked, the fluctuations designed solely to arrive at a specified flat weekly rate. Rather the Agreement provides (Ex. 1, Sec. III, par. 2, p. 26) only the amount which is to be paid to employees who work for the exact number of hours comprising the fixed regular workweek. And, since the statement of weekly earnings was thus coupled with a fixed workweek for each employee, the divisor of the Meyer formula was constant, set at 49 for all employees other than watchmen for whom the divisor was 61. Thus each employee's regular hourly rate immediately became fixed and invariable (unless, as occurred in April 1943, there was a general increase in the wage scales pursuant to Ex. 1, Article III, par. 3, p. 6), and, as will be discussed more fully below (pp. 22-22), such rate controlled all wage payments to respondents.

The central fact, therefore, is that the weekly earnings varied according to the number of hours actually worked; the regular hourly rate for non-overtime work, however, did not fluctuate. It is in this critical respect that the instant method of computing an hourly rate differs from the so-called "X-plan," which the Administrator has described in his brief in *Walling v. Halliburton Oil Well Cementing*

Co., No. 74, this Term (pp. 18-19). For the X-plan, as he there described it, applies "varying rates to achieve a constant weekly wage for a workweek in excess of the statutory minimum," the formula of which "utilizes a constant overtime rate and a variable 'regular' rate."

Plainly, when such a device is used, there is no statutory hourly rate. Rather, the X-plan simply varies the hourly rate from week to week, depending on the number of hours worked, so as to yield the fixed and controlling weekly rate; under the X-plan, the more hours the employee works in any week the smaller his hourly rate in that week, and the less hours he works, the greater his hourly rate. And whether he works 30, 40, 50, or 60 hours a week, he receives the same amount, for only his "regular" hourly rate changes. Thus, under the X-plan, the weekly rate, and not the purported hourly rate, is determinative. And it is precisely this feature of the X-plan which has been condemned by the courts. See *Walling* v. *Helmerich & Payne*, 138 F. (2d) 705 (C. C. A. 10).[14]

Thus, it is clear that this case does not involve a fixed weekly wage plan which uses the X-formula to vary the hourly rate from week to week for the single purpose of paying the weekly wage regardless of the number of hours actually worked. Rather, here there is a statement of the weekly sum due if, and only if, the employee works the precise number of hours comprising the workweek. And

[14] In his brief in the *Halliburton* case, the Administrator also cites *Castle* v. *Walling*, 153 F. (2d) 923 (C. C. A. 5); *Patsy Oil and Gas Co.* v. *Roberts*, 132 F. (2d) 826 (C. C. A. 10) and *Seneca Coal and Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10) as involving, and condemning, the X-plan. But in each of these cases, the employment contract set forth only a flat monthly or weekly rate, and did not even purport to specify an hourly rate or the means of computing such a rate; nor was the workweek fixed. The court in each case properly held that the *Missel* case required rejection of the employer's contention that, *ex post facto*, the court itself should supply an hourly rate for each week determined by the X-formula. These cases are plainly inapposite to the instant case.

from this weekly sum is derived a constant hourly rate by means of the Meyer formula.

The remaining question, therefore, is whether this constant hourly rate so derived is fictitious. Whether a rate is fictitious, and hence invalid, hinges on whether it actually controls the compensation received by the employees. *Harnischfeger* case, 325 U. S. at 424; *Youngerman-Reynolds* case, *supra*, 325 U. S. at 432; and see dissent in *Belo* case, *supra*, at 637. The method of compensation involved in this case meets this test.

In sharp contrast to the cases just cited in which the Court condemned the purported regular rate, in this case the hourly rate specified in the payrolls for each employee did in fact control their compensation in all circumstances. Thus, regardless of the number of hours worked, each employee's total pay for the week was computed on the basis of the hourly rate for hours worked under 40, and 150% (or, in specified circumstances, 175% or 200%) thereof for hours in excess of 40. If an employee worked less than 40 hours, and the cause of his absence was not excusable, he received his hourly rate times the number of hours he worked.[15] If he worked for his regular workweek of 46 hours, he received the total of (a) 40 times his regular hourly rate, and (b) six times 150% of his regular hourly rate. If an employee worked for more hours than his regular workweek of 46 hours, he received the total of (1) 40 times his hourly rate; (2) 150% of his hourly rate for the next six hours; and (3) 175% of his hourly rate for each hour in excess of 46 (Ex. 6, p. 55). And while the payrolls do not show that such an instance actually occurred in the case of any of the respondents, had any employee worked for more than 40 hours, but less than his regular workweek, and his absence was not for excusable cause, he would have

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[15] If his absence was excusable, he was paid time and a half for those hours which would, but for the excusable absences, have exceeded 40 hours, and straight time for the remaining hours actually worked (R. 141-142; Ex. 6, p. 48).

received the total of (1) 40 times his hourly rate; and (2) 150% of such rate for each hour over 40 (R. 143).[16]

Thus it will be seen that this case rests on an even sounder footing than the *Belo* case. For there, the guaranty controlled and the hourly rate never was actually applied in any case where the employee worked less than 54½ hours. In this case, the hourly rate was determinative whether the employees worked the regular workweek, or more, or less. And for each hour between 40 and their regular workweek, they received time and a half, and time and three-quarters or double time (in the case of watchmen) for hours in excess of their regular workweek.

Plainly, therefore, the court below fell into error in condemning the Meyer formula on the ground that its effect was to preclude payment of more than the agreed weekly wage except where the employee worked in excess of his regular workweek (R. p. 83). While this is quite true, it does not vitiate the method of compensation, for the weekly earnings themselves, as we have seen, comprised straight time for 40 hours, and time and a half for the remaining hours of the regular workweek. Hence, of course, no employee received pay for more than his regular workweek when he worked exactly the number of hours which constituted the workweek. Surely where an employment contract designates a regular hourly rate of, for example, 50 cents, and also sets the regular workweek at 46 hours, it does not transgress the Act simply because the employee receives only $24.50 (40 X .50 [$20.00] plus (1½ X .50) X 6 [$4.50]) for the 46 hours, and must work more than the

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[16] Thus, it is expressly stipulated (R. 143) that: "If when during any workweek an employee was absent for an inexcusable cause and therefore actually worked less hours than regularly scheduled, he was paid for the number of hours actually worked on the basis of regular time, *i.e.*, at the hourly rate as computed in the contract, *except for hours actually worked in excess of 40 hours in which latter event he would be paid for such excess hours at the rate of one and one-half times the hourly rate as computed in the contract.*" (italics supplied)

46 hours to receive more than $24.50. Yet that is precisely what the court below held.

E. The Meyer Formula and the Method of Compensation Thereunder Is Consistent with the Statutory Purposes.

The court below concluded that the Meyer formula "circumvent[s]" the Act and "negate[s] the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate" (R. p. 84). But its basic premise is mistaken. For, as we have noted (*supra*, pp. 20-22), there is no "definitely fixed" or "regular unvarying weekly wage irrespective of the number of hours worked." True it is that the statutory purposes would be thwarted if the weekly wage were fixed and unvarying, regardless of the number of hours worked.

This was the situation in the *Missel* case (316 U. S. at 574), where the employee received no overtime unless he worked almost 80 hours; in the *Helmerich & Payne* case (323 U. S. at 39), where the employee received overtime only if he worked more than 80 hours; and even in the *Belo* case (316 U. S. at 637), where no overtime accrued until 54½ hours were worked. Similarly this is the situation under the X-plan, where the employee receives no overtime, and a constant weekly rate, regardless of the number of hours worked (which are limited only by reaching that point where the divisor would become so large that the "hourly rate" would fall below the statutory minimum). But in the instant case, as we have seen, the hourly rate is constant, is applied to all non-overtime hours, and at least 150% thereof is paid for every hour over 40.

Hence the statutory purposes are here fully satisfied. As pointed out in the *Helmerich & Payne* case (323 U. S. at 40), "the Congressional purpose of enacting § 7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay require-

ment . . . ; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." Thus the Section was intended to increase "the employer's labor costs by 50% at the end of the 40-hour week" and to give "the employees a 50% premium for all excess hours." *Youngerman-Reynolds* case, 325 U. S. at 423.

The instant plan of payment achieves precisely these purposes. After the fortieth hour of work each week, petitioners' labor costs were increased by 50%, and each employee received a 50% premium. For, as we have seen, if an employee whose regular hourly rate was $.561 worked for 40 hours, he received $22.40; but if he worked 41 hours, he received not an additional $.561, but rather an additional $.843—i. e., 150% of his hourly rate.

Nor is the Meyer formula vitiated, as the District Court thought (R. 171; Ex. 4, p. 70) and as respondents have contended, simply because it may yield an hourly rate lower than the rate which the *Missel* formula would yield.[17]

There is nothing in the Act which requires that in cases where more than the statutory minimum is paid (as here), there must be an increase in the take-home pay of all employees working more than 40 hours by an amount equivalent to 50% of the prestatutory hourly rate for each hour worked in excess of 40. Indeed, so long as the minimum hourly rate is paid, the Act does not command any wage increase over pre-statutory earnings at all. For the teaching of the *Belo* case is that "nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act" (316 U. S. at 630).[18] There is no prohibition

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[17] In fact, as we have noted (*supra*, p. 18), the rates set by the National War Labor Board Agreement under the Meyer formula were substantially higher than the predecessor Sloan Agreement rates recomputed under the *Missel* formula.

[18] The dissenting opinion did not take issue with this statement. Rather, the core of the disagreement in the *Belo* case was whether the hourly rate so set was a genuine rate in the light of the weekly guaranty.

against "a genuine contractual decrease in wages, based upon bargaining, individual or collective." *Watkins* v. *Hudson Coal Co.*, 151 F. (2d) 311, 319 (C. C. A. 3), certiorari denied, 327 U. S. 777. And, upon passage of the Act, an employer may legitimately shift from payment of a weekly salary for a fixed workweek in excess of the maximum hours to a new contract "based upon an hourly basis, at a rate actually somewhat in excess of the minimum provided for by the Act, but which when calculated with normal overtime would not yield more than the amount they had been receiving on the weekly basis." *Shepler* v. *Crucible Fuel Co.*, 140 F. (2d) 371, 373 (C. C. A. 3); cf. *Bergschneider* v. *Peabody Coal Co.*, 142 F. (2d) 784 (C. C. A. 7).

And, indeed, the first Administrator of the Wage and Hour Division contemplated a method of payment similar to that here involved for the specific purpose of breaking down into hourly rates, and allocating the rates between straight time and overtime, wages which had traditionally been paid on a weekly basis. For contemporaneously with the effective date of the Act, the Administrator stated:[19]

> "Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, *because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's pay*" (italics supplied).

Thus, the hourly rates in this case were computed on the very basis, and in the very circumstances, suggested by the Administrator. That the master agreement itself did not

[19] Speech before the Southern States Industrial Council, Birmingham, Alabama, September 29, 1938, reported at 3 Wage and Hour Reporter 228, and cited in the *Belo* case, 316 U. S. at 630, note 6.

specify the hourly rates in dollars and cents, but simply enunciated the algebraic formula by which such rates could be computed in each case, surely cannot affect the result. For the Act is concerned with substance, not form. And liability cannot hinge on the insubstantial difference between specifying hourly rates in a single document—the master agreement (where, as we have seen, such specification would have been exceedingly cumbersome)—, or in two related and successive documents—the master agreement and the payrolls.

It is submitted that the circumstances leading to the adoption of the Meyer formula, the nature of the formula itself, and its actual use and operation establish its validity under Section 7 of the Fair Labor Standards Act.

Conclusion

For the foregoing reasons the judgment of the Circuit Court of Appeals should be reversed.

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